In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST LLC, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF ROBERT WAYLAND, MICHAEL COOK, CHUCK FINDLEY, MIKE GEARHEARD, REBECCA HANMER, JAMES HANLON, FRED HANSEN, EPHRAIM KING, MARTHA KIRKPATRICK, RON KREIZENBECK, BILL MATUSZESKI, PHILIP MILLAM, MARTHA PROTHRO, RANDY SMITH, AND CHARLES SUTFIN AS FORMER SENIOR STATE AND FEDERAL ENVIRONMENTAL AGENCY OFFICIALS IN SUPPORT OF RESPONDENTS

STEPHANIE TAI*
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, WI 53706
(608) 890-1236
tai2@wisc.edu
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION 5

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. *Amici*'s Experiences with Logging Roads, as well as Current Scientific Research, show that Sediment from Logging Roads Arise from Limited, Identifiable Road Segments 12

II. *Amici*'s Experiences Demonstrate that Managing Stormwater Discharges from Logging Roads Through NPDES Permitting is both Feasible and not Unduly Burdensome 14

A. Stormwater Discharge Permits for Other Similar Systems Demonstrate that General NPDES Permits Would Create Streamlined Processes for Individual Owners with Single Stormwater Pollution Prevention Plans 16

B. Stormwater Permits for Other Similar Systems Demonstrate Individual Permit Programs – Through Their State Implementation – are Tailored to be Local in Nature 23

TABLE OF CONTENTS – Continued

Page

C. Both Aspects of the NPDES Permit Program Allow for, Rather than Hinder, Broader Managerial Solutions Through the use of best Management Practices 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003) 6, 17

Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (9th Cir. 2011) 7, 10

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 16, 18, 19

Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA, 690 F.3d 9 (1st Cir. 2012) 8

STATUTES, RULES, REGULATIONS, AND PERMITS:

33 U.S.C. § 1251 5

33 U.S.C. § 1311 7

33 U.S.C. § 1341 20

33 U.S.C. § 1342 7

33 U.S.C. § 1342(b) 8

33 U.S.C. § 1342(p) 16

33 U.S.C. § 1362 7

40 C.F.R. § 120.26 25

40 C.F.R. § 122.21 ..... 7, 24

40 C.F.R. § 122.26 ..... 15, 20, 24

40 C.F.R. § 122.27 8

40 C.F.R. § 122.28 ..... 7, 15, 17, 18

40 C.F.R. § 122.32 ..... 15, 17

TABLE OF AUTHORITIES – Continued

Page

40 C.F.R. § 122.41 19

40 C.F.R. § 122.44 ..... 8, 20

40 C.F.R. § 124.19 ..... 7, 16

40 C.F.R. §§ 124.1-124.21 7

40 C.F.R. §§ 124.51-124.55 7

41 Fed. Reg. 6281 (Feb. 12, 1976) 9

57 Fed. Reg. 41236 (Sept. 9, 1992) 20

67 Fed. Reg. 58802 (Sept. 18, 2002) 21

72 Fed. Reg. 32654-01 (June 13, 2007) 21

73 Fed. Reg. 78786-01 (Dec. 23, 2008) 21

75 Fed. Reg. 5788-01 (Feb. 4, 2010) 21

77 Fed. Reg. 30473-01 (May 23, 2012) 9

77 Fed. Reg. 53834-01 (Sept. 4, 2012) 9

5 Colo. Code Regs. 1002-61 29

Colorado Department of Public Health and Environment, *General Permit for Stormwater Discharges Associated with Construction Activity* (May 31, 2007) 28

California State Water Resources Control Board, *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000004* (Apr. 30, 2003) 28

Energy Policy Act of 2005, Section 323, P.L. 109-58 (Aug. 8, 2005) 28

TABLE OF AUTHORITIES – Continued

Page

EPA, *General Permits for Storm Water Discharges Associated with Industrial Activity* (Sept. 9, 1992) 20

EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* (May 1, 2003).....21, 22

EPA, *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* (MSGP), Authorization to Discharge under the National Pollutant Discharge Elimination Program (May 27, 2009).....18, 27, 28

Ohio Environmental Protection Agency, *Authorization to Discharge under the NPDES for City of Dayton, Ohio EPA Permit No. 1PI00003*DD* (Sept. 12, 2011).....24, 25

Oregon Department of Environmental Quality, *NPDES Stormwater Discharge Permit for City of Ashland, Permit No. 102891* (Feb. 12, 2007) 26

OTHER:

Cary Coglianese, *The Managerial Turn in Environmental Policy,* 17 N.Y.U. ENVTL. L.J. 54 (2008).....29, 30

Declaration of James Hanlon (Docket #98-3).....19

TABLE OF AUTHORITIES – Continued

Page

EPA, Road-Related Municipal Separate Storm Sewer Systems, *available at* <http://cfpub.epa.gov/npdes/stormwater/municroads/home.cfm> 20

Great Lakes Envtl. Ctr., *National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices* (2008) 6, 13

Jennifer L. Seidenberg, Note, *Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water Act*, 33 ECOLOGY L.Q. 699 (2007).....17

Kathleen A. McGinty, *Pennsylvania's Approach to Sustainable Development*, 19 NAT. RES. & ENV'T 46 (2004).....17

Mark A. Ryan, *Ninth Circuit Upends the CWA Applecart*, 25 A.B.A. J. NAT. RES. & ENV'T 50, 51 (Winter 2011).....19

Mark F. Cecchini-Beaver, Note and Comment, *"Tough Law" Getting Tougher: A Proposal for Permitting Idaho's Logging Road Stormwater Point Sources after* Northwest Environmental Defense Center v. Brown, 48 IDAHO L. REV. 467 (2012).....19

Nathan Nelson, et al., U.S. Forest Service, *Rocky Mountain Research Station, Legacy Roads and Trails Monitoring Project Update 2012* (2012).....6, 12

TABLE OF AUTHORITIES – Continued

Page

Phillip R. Clark, et al., *Managing Risk in Oil and Gas Acquisition*, 2008 No. 4 Rocky Mountain Mineral Law Foundation Paper on Strategic Risk Management for Natural Resources Companies and Their Advisors, No. 8.....29

Virginia Department of Forestry, *Virginia's Forestry Best Management Practices for Water Quality* (June 2009).....7

INTEREST OF THE *AMICI CURIAE*

Amici are all former senior officials of the U.S. Environmental Protection Agency (EPA) and/or former state environmental officials with knowledge of (a) water quality problems arising from sediment pollution from logging roads or, (b) efficient and effective approaches to using the permitting mechanisms of the Clean Water Act, including general permits, to address a variety of pollution problems from discharges in circumstances similar to those of logging roads.[1] In their experience, Clean Water Act (CWA) permits have achieved a high degree of compliance with requirements and could reduce logging road pollution in a feasible and effective manner.

Robert Wayland served as the EPA Deputy Assistant Administrator for Water from 1989 to 1991, and EPA's Director of the Office of Wetlands, Oceans, and Watershed from 1991 to 2003. He was a Member of the Virginia State Water Control Board from 2006 to 2011.

Michael Cook served in the EPA from 1991 to 2002 as Director of the Office of Wastewater Management, which was responsible for general and individual permits to control several hundred thousand

---

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici* or their counsel and counsels' employers made a monetary contribution to the preparation or submission of this brief. The parties to the case filed a letter of blanket consent to filing *amicus* briefs and letters are lodged with the Clerk.

municipal and industrial wastewater and stormwater discharges. He has served on the Board of Directors for the Green Infrastructure Center and U.S. Water Alliance since 2007.

Chuck Findley worked for EPA for 30 years. During the last 23 years he held several senior management positions at EPA Region X including Water Permits Section Chief, Water Division Director, Deputy Regional Administrator and Acting Regional Administrator. He represented EPA in developing the interagency Northwest Forest Plan with other federal agencies.

Mike Gearheard was the Region X Water Division Director from 2004 to 2009 and the acting deputy regional administrator until his retirement in July 2009.

James Hanlon was the Director of the Office of Wastewater Management, the senior career executive responsible for the management of the national NPDES permitting program, including stormwater, from 2002 to 2012. Hanlon was Deputy Director of the Office of Science and Technology from 1991 to 2002, the Director of the Municipal Construction Division from 1984 to 1991, and held a variety of staff and management positions in EPA Region 5 from 1972 to 1984.

Fred Hansen was the Deputy Administrator of EPA from October 1994 to September 1998. Prior to serving at EPA, Hansen was the Director of the

Oregon Department of Environmental Quality from February 1984 to October 1994.

Rebecca Hanmer was the Acting Assistant Administrator for Water, Deputy Assistant Administrator for Water, and Director of the Office of Water Enforcement and Permits between 1982 and 1989, and was EPA's liaison with Congress during enactment of the 1987 Water Quality Act. She also directed various EPA regional programs from 1977 to 2007.

Ephraim King was the Branch Chief in EPA's National Pollutant Discharge Elimination System Program from 1987 to 1996 with responsibility for developing and executing EPA's national strategy to implement Phase I stormwater regulations, including authorization of 23 states to issue stormwater permits. King was a Branch Chief and Division Director in EPA's Drinking Water Program from 1996 to 2005. From 2005 to 2011, he was the Director of the Office of Science and Technology which develops water quality standards, EPA recommended criteria, technology-based effluent guidelines, and oversees all state water quality standards programs. King also served as staff attorney for EPA from 1979 to 1987.

Martha Kirkpatrick was an attorney in the EPA Office of Water from 1984 to 1991, serving as a Branch Chief in the Office of Water and Special Assistant to the Deputy Assistant Administrator for Water. She was the Commissioner of the Maine Department of Environmental Protection (DEP) from

1999 to 2003, and served as the DEP's Director of the Bureau of Land and Water Quality from 1991 until 1999.

Ron Kreizenbeck was an EPA employee for over 38 years. Kreizenbeck served as Deputy Regional Administrator for Region X from 2000 to 2008, Director of the Office of Enforcement and Compliance from 1995 to 2000, Director of the Environmental Services Division from 1991 to 1995, and Deputy Director of the Water Division from 1985 to 1991.

Bill Matuszeski was the Director of EPA's Chesapeake Bay Program from 1991 to 2001, and the Associate Assistant Administrator for Water between 1989 to 1991. He is currently on the Boards of the Alliance for the Chesapeake Bay and the Hudson River Foundation.

Philip Millam served as Director of the Office of Water for EPA Region X from 1997 to 1999. He represented EPA on the Forest and Fish negotiations that reached agreement among the state, tribes, and federal agencies regarding forest practices on private land in the State of Washington.

Martha Prothro served in the EPA as Deputy Assistant Administrator for Water from 1991 to 1994, Director of Water Regulations and Standards from 1987 to 1991, and Director of the Permits Division in the Office of Water from 1980 to 1987. From 1995 to 1997, she facilitated EPA's Federal Advisory Committee on Total Maximum Daily Loads, which resulted in

a series of recommendations on implementing water quality standards under the CWA.

Randy Smith was director of the Office of Water in EPA Region X from 1998 to 2004, where he was responsible for Clean Water Act programs in Alaska, Idaho, Oregon, and Washington.

Charles Sutfin was the Director of EPA's Assessment and Watershed Protection Division from 2001 to 2004, the Director of the Water Permits Division from 1999 to 2001, the Director of the Water Division at Region V from 1977 to 1990, the Deputy Director of the Municipal Construction Division from 1975 to 1977, and the Deputy Chief and Chief of the Municipal Technology Branch from 1971 to 1975. He had national responsibility for water permits, watershed planning, non-point source control, water monitoring and assessment, and the development of Total Maximum Daily Loads at various times during his career. At Waste Management Inc., from 1990 to 1997, Sutfin was a corporate Director responsible for environmental compliance of its operations with all international, federal, state and local environmental requirements.

INTRODUCTION

The objective of the Clean Water Act (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Achieving that goal, however, is hampered by problems with existing logging activities. As an

EPA-commissioned report has observed, "forestry-related sediment is a leading source of water quality impairment to rivers and streams nationwide." Great Lakes Envtl. Ctr., *National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices* [hereinafter *National Level Assessment*] 2 (2008) (citing EPA's 2000 and 2002 National Water Quality Inventories). Almost all of this sediment, in turn, derives from logging roads and stream crossings. *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 961 (9th Cir. 2003) (attributing to these sources "up to 90% of the total sediment production from forestry operations"). The sedimentation that arises from these roads is frequently limited to very confined segments, rather than the entire contiguous length of the road. *See* Nathan Nelson, et al., U.S. Forest Service, *Rocky Mountain Research Station, Legacy Roads and Trails Monitoring Project Update 2012* [hereinafter *Legacy Roads and Trails Monitoring Project Update*], at 4 (2012), *available at* <http://www.fs.fed.us/GRAIP/downloads/case_studies/2012LegacyRoadsMonitoringProjectUpdate.pdf> (last visited Oct. 19, 2012) ("Sediment delivery from large studies of forest roads has been found to be localized at a small fraction of the drain points."); *National Level Assessment*, at 14 (describing a study that finding only 0.6% of the length of the roads studied contributed to "events displacing significant quantities [of sedimentation]"). Moreover, these roads are often constructed such that stormwater discharge is channeled from the roads through "systems of ditches, culverts, and

channels," such as the ones at issue here. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067 (9th Cir. 2011); *see, e.g.*, Virginia Department of Forestry, *Virginia's Forestry Best Management Practices for Water Quality* 23-38 (June 2009), *available at* <www.dof.virginia.gov/wq/resources/FieldBMP/FieldBMP_01_Intro.pdf> (last visited Oct. 19, 2012) (describing general best management practices for the planning and construction of logging roads).

The Clean Water Act provides a powerful tool for addressing this problem: the National Pollutant Discharge Elimination System (NPDES) Program. The NPDES Program is a permitting program for "point source[s]": "any *discernable, confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Under this program, a point source can be authorized to discharge pollutants into waters of the United States through the grant of an NPDES permit, 33 U.S.C. § 1342; otherwise, such discharges are prohibited, 33 U.S.C. § 1311(a).

This tool lets an administering agency address point-source pollution by allowing it to regulate discharges through either individual permits, *see* 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.55, or general permits to cover entire classes of discharges, 40 C.F.R. § 122.28, 124.19(a). EPA has authorized

forty-six states and the U.S. Virgin Islands to administer programs in satisfaction of the NPDES requirements pursuant to CWA sec. 402(b). 33 U.S.C. § 1342(b). Administering agencies can issue general NPDES permits in order to "greatly reduce [the] administrative burden by authorizing discharges from a category of point sources within a specified geographic area." 40 C.F.R. § 122.28(a)(2). Administering agencies can also issue individual permits that contain technology-based limitations and standards, 40 C.F.R. § 122.44(a)(1), monitoring requirements, 40 C.F.R. § 122.44(i), or required best management practices ("BMPs"), 40 C.F.R. § 122.44(i). The net effect of these tools is to allow permitting agencies to address forest-road discharges in a manner tailored to both the water restoration and maintenance goals of the CWA, as well as the particularized concerns of states or specific permittees. *See, e.g.*, *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) (describing the NPDES individual permit as "bring[ing] both state ambient water quality standards and technology-based effluent limitations to bear on individual discharges of pollution . . . and tailor[ing] these to the discharger").

EPA claims, however, that its Silvicultural Rule (hereinafter "Rule") exempts from the NPDES permit program silvicultural sources that arise from "road construction and maintenance from which there is natural runoff," 40 C.F.R. § 122.27(b)(1), regardless of whether "ditches, pipes and drains" would "channel, direct, and convey" the discharge. *See* Br. for the

United States as *Amicus Curiae* Supporting Petitioners, at 4. But even assuming, for the sake of argument, that the rule functions as an exception, EPA's interpretation was created not on the basis of the definitions provided by Congress through the CWA, but instead on EPA's determination that sedimentation from the exempted categories is "more effectively controlled by the use of planning and management techniques." EPA, *National Pollutant Discharge Elimination System and State Program Elements Necessary for Participation*, 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976); *see also* EPA, *Notice of Proposed Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads*, 77 Fed. Reg. 53834-01, 53836 (Sept. 4, 2012) ("The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well suited to address the complexity of forest road ownership, management, and use."); EPA, *Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges*, 77 Fed. Reg. 30473-01, 30474 (May 23, 2012) ("EPA believes that stormwater discharges from forest roads should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that are well-suited to address the complexity of forest road ownership, management, and use.").

In this case, the Ninth Circuit rejected the petitioners' argument that the EPA, through its current Rule, could categorically exempt all stormwater discharges from logging activities resulting from natural runoff. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d at 1079-80. Determining that it was ambiguous, the court reasoned that the Rule – if applicable to all forestry activities "irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into" waters of the United States – itself contravened the CWA, *id.* at 1080, but that the Rule could be construed to be consistent with the statutory definition of point source if it is read to exempt only "natural runoff," that is, runoff that is not collected, channeled, and discharged into waters of the United States from point sources, *id.*

Amici, as former senior environmental officials with experience in managing water pollution, agree with the Ninth Circuit analysis and thus ask the Court to affirm the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

I. Sediment discharges from logging roads arise from limited, identifiable road segments, thereby allowing feasible implementation of an NPDES permit program for logging roads. Logging road structures, which must be constructed to address drainage from storm events to avoid rendering the roads impassable, contain through their very design elements

the means to allow for effective and feasible regulation through a combination of prescriptive and management-based requirements available in NPDES permits.

II. The use of the NPDES permitting program in similar non-logging-road contexts, such as stormwater discharges from Municipal Separate Storm Sewer Systems (MS4s), demonstrates that applying an NPDES permitting program to logging roads is both feasible and not unduly burdensome. Through the MS4 NPDES permit program, and other similar programs, agencies have already been addressing stormwater discharges from road structures for quite some time, using a combination of general and individual permits. They can thus draw from these prior experiences to implement a logging-road NPDES permitting program to accommodate concerns of administrative and technical practicability.

A. General NPDES permits provide one instrument that agencies can use to address concerns of administrative feasibility and still comply with the CWA, and are the primary avenue through which MS4s and many other similar sources are regulated. General permits allow agencies to cover general classes of activities, thereby allowing potential permittees to avoid submitting individual permit applications. They also can contain mechanisms to further streamline the compliance process, and to tailor those permits to state and local contexts.

B. For a limited set of applicants, individual NPDES permits may be required to address circumstances not covered through general NPDES permits. However, these individual NPDES permits can also be streamlined to allay concerns of practicability, by incorporating generalized elements and exceptions for activities found to create limited stormwater discharge.

C. Both general and individual NPDES permits can and do address stormwater discharges through managerial mechanisms, rather than solely relying on technical requirements. As seen in a number of similar NPDES permitting contexts to the ones at issue here, the incorporation of managerial approaches within general and individual permits allows agencies to leverage permittees' internal management structures in order to achieve greater water quality.

ARGUMENT

I. *Amici*'s Experiences with Logging Roads, as well as Current Scientific Research, show that Sediment from Logging Roads Arise from Limited, Identifiable Road Segments

The actual stormwater runoff that arises from logging roads is not uniformly spread throughout the entire forest system, but is instead limited to discrete segments capable of NPDES permitting. *See Legacy Roads and Trails Monitoring Project Update*, at 4;

National Level Assessment, at 14. Thus a general permit could focus planning, construction and operation Best Management Practices (BMPs) on highest priority sources of pollution within the system while being applicable to an entire logging road system. Alternatively, in some instances, leaving out some low priority road segments within a road system under certain circumstances might even be feasible, given the context of a particular road system.

The discrete character of sediment discharge from logging roads is due to the nature of the roads themselves, which must be constructed to address drainage during storm events to avoid rendering them impassable due to flooding and erosion of the roads. Thus such logging roads are often structured to involve systems of ditches (to maintain proper drainage), drainage structures (to deliver road runoff from ditches to the forest floor or other vegetated areas), and relief culverts (drainage structures that are especially effective for removing ditch and road water).

As described in the Brief of Dr. Kevin Boston as *Amicus Curiae* in Support of Respondent, forestry operations are industrial activities, Br. at 3-5, and thus logging roads must be constructed to accommodate such activities. *Id.* at 11-25. These construction designs, in turn, entail identifiable elements that may lead to discharge of sedimentation to waters of the United States. For example, logging roads must be designed to avoid rutting from water that disables designed drainage structures from shedding water

from the road. *Id.* at 14-15. This can be accomplished through choice of road shape, *id.* at 15, and the use of particular drainage systems in combination with the road shape, *id.* at 16-17. Each of these aspects of construction – especially if poorly designed – can create points at which sedimentation can be discharged from logging roads. *Id.* at 18-21. An NPDES permit program, with the combination of prescriptive and management-based requirements available to agencies, can provide a feasible and effective means of addressing such discharges.

II. *Amici*'s Experiences Demonstrate that Managing Stormwater Discharges from Logging Roads Through NPDES Permitting is both Feasible and not Unduly Burdensome

As environmental officials familiar with implementing the NPDES permit program in a number of areas, we view the application of NPDES permits to stormwater discharges from logging roads to be both feasible and not unduly burdensome. Nevertheless, Petitioners, and *amici* writing on behalf of the petitioners, contend that the NPDES permit program cannot address the management of stormwater discharges arising from logging roads, and suggest it should be limited to manufacturing activities. *See* Br. *Amicus Curiae* of Pacific Legal Foundation, et al., in Support of Petitioners, at 12-18. Experience shows these concerns are unwarranted. Instead, agency officials have found a number of efficient and effective

approaches to using the permitting mechanisms of the Clean Water Act, including general permits, to address a variety of pollution problems from discharges not associated with traditional manufacturing activities. *See, e.g.*, 40 C.F.R. § 122.28(a)(4) (allowing, for municipal separate storm sewers, an agency to issue permits on a "system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges"). This includes administering agencies' experience with using the NPDES permit program – through a combination of general and individual permits – to manage stormwater discharges from municipal road systems to state highway systems, 40 C.F.R. § 122.32.

Stormwater within the system of logging roads could be managed in much the same manner that stormwater has been successfully and feasibly managed for non-logging roads under the CWA. There are over 55 million miles of non-logging paved roads in the United States. Under the current NPDES regulatory program, roads within the boundaries of large, medium and small MS4s are part of the NPDES regulatory program and are almost entirely subject to the implementation of Best Management Practices (BMPs) as outlined in their permits, as explained later in this brief. In addition, under the authority of 40 C.F.R. § 122.26(a)(1)(v), additional segments or systems of storm sewers may be designated as needing NPDES permit coverage based on factors including the volume, pollutant nature, frequency, location

with respect to high quality or impaired water body segments or other water quality considerations. These designated segments or systems of MS4s are essentially all subject to BMPs under the terms of NPDES permits.

Section 402(p) of the CWA provides unique authority to manage uncontrolled sources of pollution. 33 U.S.C. § 1342(p). It is through this authority that EPA, working as required by the provision with the States, could implement a system of effective and efficient controls to manage stormwater from forest roads in high priority locations to protect water quality. As outlined elsewhere, controls relying on general permits and BMPs would provide these effective and efficient tools.

A. Stormwater Discharge Permits for Other Similar Systems Demonstrate that General NPDES Permits Would Create Streamlined Processes for Individual Owners with Single Stormwater Pollution Prevention Plans

When entire classes of dischargers discharge pollutants of a similar nature in a similar manner, as with the logging roads at issue here, administering agencies have used general NPDES permits to "greatly reduce [the] administrative burden by authorizing discharges from a category of point sources within a specified geographic area." 40 C.F.R. § 124.19(a); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n. * (2004)

(citing 40 C.F.R. § 122.28(b)(2)(v)). This has been used widely in the context of regulating discharges from similar contexts such as transportation roads, 40 C.F.R. § 122.32(a) (including within its scope "systems operated by . . . State departments of transportation"), to avoid subjecting most entities from the requirement to apply for individual permits.

Administrating agencies can use general permits to simplify and streamline the permitting process while achieving compliance with the CWA. *See Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 881 (9th Cir. 2003); *see also* Jennifer L. Seidenberg, Note, *Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water Act*, 33 ECOLOGY L.Q. 699, 705 (2007) (describing the purpose behind the use of general permits for storm water discharges); Kathleen A. McGinty, *Pennsylvania's Approach to Sustainable Development*, 19 NAT. RES. & ENV'T 46, 49 (2004) (describing the State of Pennsylvania's advocacy of general permits to ease burdens for applicants while still meeting the requirements of the CWA). Rather than evaluate each polluting activity through individual applications for permits, an agency may issue a general permit for certain categories of activities. 40 C.F.R. § 122.28.

This process, in turn, allows an entity that believes itself to be covered by a general permit to fulfill

its permitting requirement by submitting a "notice of intent"[2] to discharge pursuant to the general permit. 40 C.F.R. § 122.28(b)(2); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n. * (2004) ("Once [the] EPA or a state agency issues such a [general] permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions."). If that proposed discharge does indeed fall within the scope of the general permit, the entity need not go through the individual permit process, but instead can simply comply with the terms of the general permit.[3] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 108 n. *. Such is

---

[2] In some situations, the burdens may be even lighter on entities. Under 40 C.F.R. § 122.28(b)(2)(v),

> Discharges other than discharges from publicly owned treatment works, combined sewer overflows, municipal separate storm sewer systems, primary industrial facilities, and storm water discharges associated with industrial activity, may, at the discretion of the Director, be authorized to discharge under a general permit without submitting a notice of intent where the Director finds that a notice of intent requirement would be inappropriate.

[3] This can be a relatively speedy process; for example, in the case of EPA's Multi, this process usually commences in within 30 days subject to monitoring and reporting requirements. EPA, *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP)*, Authorization to Discharge under the National Pollutant Discharge Elimination Program [hereinafter MSGP], tbl. 1-2 (May 27, 2009), *available at* <http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf>.

the case with most entities, where 96% of regulated entities that discharge stormwater take advantage of the general permit program without need for individual permits. Declaration of James Hanlon (Docket #98-3) at 8; *see also* Mark F. Cecchini-Beaver, Note and Comment, *"Tough Law" Getting Tougher: A Proposal for Permitting Idaho's Logging Road Stormwater Point Sources after* Northwest Environmental Defense Center v. Brown, 48 IDAHO L. REV. 467, 505 (2012) ("More recently, the EPA's Assistant Regional Counsel for Idaho, writing on his own behalf, found it 'unlikely' that individual permits would be required.") (citing Mark A. Ryan, *Ninth Circuit Upends the CWA Applecart*, 25 A.B.A. J. NAT. RES. & ENV'T 50, 51 (Winter 2011)).

These general permits are both feasible and valuable tools for addressing pollution problems arising from a number of systems, by allowing administering agencies to structure such aspects as effluent standards, *see* 40 C.F.R. § 122.41(a)(1); mitigation, 40 C.F.R. § 122.41(b); monitoring and reporting, *see* 40 C.F.R. § 122.41(d), (j) & (l); and operation and maintenance, *see* 40 C.F.R. § 122.41(e), in order to fulfill the requirements of the CWA. Indeed, such concerns have many common elements that could be covered in a general permit, including: pollutants of concern (sediment, temperature, some chemicals related to road use and maintenance); road layout (*e.g.*, avoid wetlands and steep grades, minimize stream crossings); road and stream crossing design, operation, maintenance road closure, and road removal. As such,

well-implemented plans required in a general permit covering these and other widely understood elements would provide a feasible way of protecting water quality as required by the CWA. Moreover, such general permits can be and also are tailored to state and regional concerns. *See* 40 C.F.R. § 122.44. Even in the context of traditional industrial pollution, EPA's (earlier) general permit for covering stormwater discharge associated with industrial activity (except discharges from construction activity) includes state-specific requirements imposed by state certification under Section 401 of the Clean Water Act. 33 U.S.C. § 1341. *See* EPA, *General Permits for Storm Water Discharges Associated with Industrial Activity*, 57 Fed. Reg. 41236-0, 41237 (Sept. 9, 1992).

Such general permits have already been successfully used – despite *amici* descriptions of administrative challenges, *see* Br. *Amicus Curiae* of Pacific Legal Foundation, et al., in Support of Petitioners, at 12-15 – to address pollutants resulting from stormwater discharges, through the coverage of municipal separate storm sewer systems, which in turn cover road systems, 40 C.F.R. § 122.26(b)(8) (defining "municipal separate storm sewer systems as including "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains"); EPA, Road-Related Municipal Separate Storm Sewer Systems, *available at* <http://cfpub.epa.gov/npdes/stormwater/municroads/home.cfm>. *See, e.g.*, EPA, *Notice of Availability of Draft National Pollutant Discharge Elimination System (NPDES)*

General Permits for Small Municipal Separate Storm Sewer Systems (MS4) [for regions in Massachusetts as part of EPA Region 1], 75 Fed. Reg. 5788-01 (Feb. 4, 2010) (covering, among other things, "non-traditional transportation systems"); EPA, *Notice of Availability of Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Small Municipal Separate Storm Sewer Systems (MS4) [for "discharges from small MS4s to certain waters of the states of New Hampshire and Vermont, and to certain waters on Indian Country lands in the states of Connecticut and Rhode Island"]*, 73 Fed. Reg. 78786-01 (Dec. 23, 2008); EPA, *Final NPDES General Permits for Small Municipal Separate Storm Sewer Systems (sMS4s) in New Mexico, Indian Country Lands in New Mexico and Indian Country Lands in Oklahoma; Minor Revisions and Corrections*, 72 Fed. Reg. 32654-01 (June 13, 2007); EPA, *Notice of Availability of NPDES Storm Water General Permit for Small MS4s [for EPA Region 9]*, 67 Fed. Reg. 58802 (Sept. 18, 2002).

These general permits, in turn, often include the use of particular management techniques in order to address discharges resulting from these systems. *See, e.g.*, EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* at 19 (May 1, 2003), *available at* <http://www.epa.gov/region1/npdes/permits/permit_final_ms4.pdf> (requiring a general permittee to "[i]nclude, at a minimum, maintenance activities for . . . roadway drainage system maintenance"); *id.* at 20-35 (describing the Massachusetts

and New Hampshire transportation MS4). Such techniques can include requiring dischargers to develop and implement Storm Water Management Programs (SWMPs) that include, among other things, "Public Education and Outreach on Storm Water Impacts," "Illicit Discharge Detection and Elimination" provisions, and "Pollution Prevention/Good Housekeeping for Municipal Operations." *See, e.g.*, EPA, *Notice of Availability of NPDES Storm Water General Permit for Small MS4s [for EPA Region 9]*, 67 Fed. Reg. 58802 (Sept. 18, 2002); EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* at 20-35.

General permit requirements can also include the use of BMPs that act as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal or drainage from raw material storage." EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* at 40.

As seen in the SWMP context, such management techniques can also be adapted to reflect concerns of feasibility and effectiveness, based upon experiences with the use of those techniques. For example, a general permit can require that outfall identification

for roadway systems be done on a less individualized basis, in order to address feasibility concerns. *See, e.g., id.* at 30 ("Due to the magnitude of a transportation agency's drainage system, identification of outfalls may be done on a district basis, and as part of construction and redevelopment projects."). General permits requiring the use of BMPs in turn may be modified if the original BMP has been demonstrated to be either infeasible or ineffective. *See, e.g., id.* at 20. Moreover, general permits can also be designed to contain exceptions for particular discharges – again to address particular implementation concerns. *See, e.g., id.* at 8 (listing exceptions for non-storm water discharges).

Such a panoply of flexible techniques has allowed water managers to tailor general permits to address concerns of practicability while also complying with the CWA. Given this ample experience with other similar contexts, we expect that the NPDES permit program can be feasibly and effectively applied to the logging roads at issue here.

B. Stormwater Permits for Other Similar Systems Demonstrate Individual Permit Programs – Through Their State Implementation – are Tailored to be Local in Nature

Individual NPDES permits can be tailored towards local conditions for those very limited sets of activities that are likely to fall outside of any general

permit program. *See* Declaration of James Hanlon (Docket #98-3) at 8. But although these individual permits involve an individualized application process, *see, e.g.*, 40 C.F.R. § 122.21(h), an individual permit requirement does not necessarily mean that each individual outflow would require separate individual NPDES permits. As our experience managing the large and municipal separate storm sewer systems demonstrates, even when a general permit is unavailable to an individual operator, that operator need simply submit a permit application that identifies "the location of known municipal storm sewer system outfalls discharging to the waters of the United States." 40 C.F.R. § 122.26(d)(1)(iii)B)(1). What that operator receives as a result is not a series of separate permits for each individual outflow point, but rather a single permit that covers the entire municipal storm sewer system (either on a jurisdiction-wide or discharge-wide basis), including those individual outflow points. 40 C.F.R. § 120.26(d).

The manner in which individual permits can be structured to provide broad, flexible coverage can be seen in an examination of individual MS4 permit terms. For example, the individual NPDES MS4 permit for Dayton, Ohio, is expressly structured to cover "the corporate boundary of the City of Dayton served by the Permittee's Municipal Separate Storm Sewer System," Ohio Environmental Protection Agency, *Authorization to Discharge under the NPDES for City of Dayton, Ohio EPA Permit No. 1PI00003*DD*, at 2 (Sept. 12, 2011), *available at* <http://www.epa.ohio.gov/

portals/35/storm/Dayton_1PI00003_DD.pdf>, which in turn can include "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, [and] storm drains," *id.* at 41. The permit focuses primarily on creating generalized requirements, such as the adoption of public education and participation programs to reduce litter, pet waste, and other sources of pollutants from being carried by the stormwater system to waters of the United States, *id.* at 9-12, the development of illicit discharge detection plans, *id.* at 14-17, and the use of monitoring and reporting, *id.* at 30-32. Moreover, individual outfalls are not addressed in a particularized way; rather, the permit requires the permittee to develop its own individual map on its own, assessing storm water outfalls for use in implementation and assessment of the other provisions of the permit. *Id.* at 10.

As with the general permits described earlier, an individual permit can also be structured to address feasibility concerns in a manner consistent with the Clean Water Act. The Dayton NPDES MS4 permit, for example, allows for the replacement of BMPs that turn out to be ineffective or infeasible. *Id.* at 5. And even specific requirements are structured to allow for tailoring "appropriate for the City," *id.* at 21 (allowing a range of BMPs), as well as for prioritization according to potential impacts, *id.* at 26 (describing prioritization allowed for street-sweeping programs).

Similar provisions can be seen in other individual permits around the country. *See, e.g.*, Oregon Department of Environmental Quality, *NPDES Stormwater Discharge Permit for City of Ashland, Permit No. 102891* (Feb. 12, 2007), *available at* <http://www.deq.state.or.us/wq/pn/permits/ashland.pdf>. The point of these examples is not to provide a comprehensive survey of all individual MS4s across the nation, but to demonstrate that agencies can and do use a number of techniques to address concerns of feasibility while simultaneously fulfilling the requirements of the CWA. Administering agencies can thus draw from these prior successes with storm sewer systems (which, as explained earlier, include transportation systems) to apply the NPDES permit program to logging roads in similar feasible and nonburdensome ways.

C. Both Aspects of the NPDES Permit Program Allow for, Rather than Hinder, Broader Managerial Solutions Through the use of best Management Practices

As described in the introduction, EPA premises its approach of excluding logging roads from the NPDES permit program on the grounds that logging roads are "more effectively controlled by the use of planning and management techniques." *Cf.* Br. of the Society of American Foresters et al. as *Amicus Curiae* in Support of Petitioners, at 12-30 (suggesting that NPDES exclude the use of BMPs). But this

mischaracterizes the NPDES permit program as excluding planning and management techniques.

Rather, our experience demonstrates that the NPDES permit program has been used in a number of instances to apply planning and management approaches to systems of similar complexity. One of these ways is through the use of Stormwater Pollution Prevention Plans (SWPPPs) and Best Management Practices (BMPs) that incorporate planning and managerial approaches into other NPDES permitting systems.

For example, EPA's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP), issued by the EPA to cover a number of operators of stormwater discharges associated with industrial activity, requires general permittees to prepare SWPPPs for permit coverage. EPA, *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* pt. 5 (May 27, 2009), *available at* <http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf>. A number of aspects of these SWPPPs involve either planning or management approaches, rather than engineering approaches. SWPPPs must plan and manage good housekeeping measures, maintenance measures, spill prevention and response procedures, and employee training. *Id.* pt. 5.1.5.1. SWPPPs must also address discharges through a series of management techniques, which allow for the implementation of "appropriate control measures," as well as other strategies to minimize pollutants in discharges. *Id.*

pt. 2.1.2.6. SWPPPs are also encouraged to address erosion and sediment using BMPs. *Id.* pt. 2.1.2.5. Similar types of management approaches can be seen in state permits for similar activities. California's draft general permit for waste discharge requirements for storm water discharges from small municipal separate storm sewer systems, for example, would require the use of BMPs to reach the requirements of the CWA. *See* California State Water Resources Control Board, *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000004*, at 5-6, 8-13 (Apr. 30, 2003), *available at* <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2003/wqo/wqo2003_0005dwq.pdf>.

Another example of the existing capacity of state environmental agencies to use managing and planning techniques in the context of NPDES permitting is the program that Colorado has used to regulate stormwater discharges from oil and gas construction sites. *See* Colorado Department of Public Health and Environment, *General Permit for Stormwater Discharges Associated with Construction Activity* (May 31, 2007), *available at* <http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596875260>. While a permit system for oil and gas construction sites is not required under federal law, *see* Energy Policy Act of 2005, Section 323, P.L. 109-58 (Aug. 8, 2005) (exempting such activities from EPA's stormwater permitting regime), Colorado has nevertheless chosen to implement a permit program under which an applicant must include a certification that the

operator has developed and will implement a Stormwater Management Plan (SWMP). 5 Colo. Code Regs. 1002-61, Section 61.2. This SWMP, in turn, must identify BMPs that will meet the terms and conditions of the general state permit, which in turn are used to reduce the pollutants in stormwater discharges associated with oil and gas construction activity. *See* Colorado Department of Public Health and Environment, *General Permit for Stormwater Discharges Associated with Construction Activity*, at 10-14. These BMPs, in turn, can include a variety of planning and management elements, such as erosion and sediment controls. *See* Phillip R. Clark, et al., *Managing Risk in Oil and Gas Acquisition*, 2008 No. 4 Rocky Mountain Mineral Law Foundation Paper on Strategic Risk Management for Natural Resources Companies and Their Advisors, No. 8.

Management tools such as SWPPPs and BMPs can provide a feasible and effective means for addressing pollution arising out of complex systems, including logging roads. As scholars have observed, BMPs and other management strategies "tend not to impose one-size-fits-all standards, but instead give firms responsibility for developing their own responses to environmental problems, thereby leveraging firms' superior knowledge about the risks they generate and the potential methods of reducing those risks." Cary Coglianese, *The Managerial Turn in Environmental Policy,* 17 N.Y.U. ENVTL. L.J. 54, 55 (2008); *see also id.* at 70 (describing the use of BMPs as potentially allowing for "more creative, less rigid,

more holistic management that fosters outside-the-box thinking," depending upon the implementation). Their use in the permitting context thus leverages permittees' internal management structures in order to achieve greater water quality. *Cf. id.* at 60-61 (describing management-based regulations as "premised on the notion that a firm's internal management critically shapes its impact on environmental quality. This underlying assumption is gaining support in a growing body of academic research."). Given the use of these tools in other similar contexts, we expect that they can also be used for logging roads in order to achieve CWA compliance in an effective and feasible manner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEPHANIE TAI*
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, WI 53706
(608) 890-1236
tai2@wisc.edu
**Counsel of Record*